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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 650

JOHN F. MARAGON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 103-104)[1] is reported at 187 F. 2d 79.

JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1950 (R. 105), and a rehearing was denied *en banc* on March 2, 1951 (R. 117). The petition for a writ of certiorari was filed on

[1] The symbol "R." refers to the printed joint appendix and "Tr." to the original stenographic transcript of record.

April 2, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence in a prosecution for perjury, consisting of testimony by a number of witnesses and numerous documents, is insufficient because no one witness testified directly as to all aspects of the false statements.

2. Whether the trial court properly instructed the jury as to the element of wilfulness in the crime as defined by the District of Columbia Code.

3. Whether, in the circumstances of this case, Government employees should have been disqualified as members of either the grand or petit juries.

4. Whether the subcommittee before which petitioner made the sworn statements was a "competent tribunal" within the meaning of the perjury section of the District of Columbia Code.

STATUTES INVOLVED

22 D. C. Code 2501 (1940) provides:

> *Perjury.—Subornation of Perjury.* Every person who, having taken an oath * * * before a competent tribunal, * * * in any case in which the law authorized such oath * * * to be administered, that he will testify * * * truly, * * * wilfully and contrary to such oath * * * states * * * any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury

> * * * shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. * * *

Section 133(f) of the Legislative Reorganization Act of 1946, 60 Stat. 831 provides:

> All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session.

Section 134(a) thereof provides:

> Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures * * * as it deems advisable. * * *

STATEMENT

Petitioner was found guilty under the first and third counts of a four-count indictment charging him with perjury before a Senate subcommittee in violation of the perjury section of the District of Columbia Code, 22 D.C. Code 2501 (1940). He was sentenced to imprisonment for eight months to two years on each of such counts, the sentences

to run concurrently (R. 9) On appeal to the Court of Appeals for the District of Columbia Circuit the conviction was affirmed (R. 105), and a rehearing was denied *en banc* (R. 117).

The perjured statements were made in the course of sworn testimony by petitioner before the Subcommittee on Senate Investigations of the Committee on Expenditures in the Executive Departments, which was then occupied in an investigation of so-called "five percenters" (*i.e.,* commission agents who deal with the Government on behalf of principals) (R. 11-12). The counts under which petitioner was found guilty charged him with wilfully and falsely making the following material statements, not believing them to be true: that he did not have, either in the year 1945 or 1946, any bank account except an account in the Union Trust Company of Washington, D. C.; and that when he obtained employment with the State Department on a mission to Greece, he was not in the employ of anybody else and had already discontinued his employment with Albert Verley and Company of Chicago, Illinois (R. 4-5).

A. *The Evidence as to Count One.* Petitioner appeared on July 28, 1949, and after being sworn (R. 20-21), was questioned as to his occupation and sources of income during 1945 and the years following. With reference to the year 1945 he was asked by the subcommittee counsel, "Did you have any bank accounts at that time?" He answered, "I had a bank account with the Union Trust," and

stated that this bank balance "was pretty close to $4,000, something like that" (R. 25). The following questions and answers appear in the transcript of the proceeding (Gov. Ex. 2):

> Mr. ROGERS: Did you have any other bank account in 1945?
>
> Mr. MARAGON: No, sir.
>
> Mr. ROGERS: Just the Union Trust Company?
>
> Mr. MARAGON: That's right. [R. 34.]
>
> * * * * *
>
> Mr. ROGERS: And you had no other bank account at all except the Union Trust Company in 1945; is that correct?
>
> Mr. MARAGON: Yes, sir. [R. 34-35.]
>
> * * * * *
>
> Mr. ROGERS: Now let's go to 1946. Did you have the same bank account in 1946?
>
> Mr. MARAGON: Yes, sir.
>
> Mr. ROGERS: Did you have any additional bank accounts in 1946?
>
> Mr. MARAGON: Yes, sir. [R. 35.]
>
> * * * * *
>
> Mr. ROGERS: Did you have any other bank account in 1946?
>
> Mr. MARAGON: No.
>
> Mr. ROGERS: Only in the Union Trust Company?
>
> Mr. MARAGON: That's right. [R. 38.]
>
> * * * * *

Mr. ROGERS: In 1946, did you have any other bank accounts except in the Union Trust Company?

Mr. MARAGON: No other account. [R. 39.] [2]

During the trial Senator Hoey testified that he heard petitioner state under oath that he had just the one bank account (R. 12). Mr. Sexauer, assistant cashier of the National Bank of Commerce, San Antonio, Texas, identified a bank signature card bearing petitioner's name as being one given him at that bank by an individual who had signed it, though he could not positively identify petitioner in the court room (R. 14-16, Gov. Ex. 4a). He also identified as part of the same San Antonio account, ledger sheets [3] and a large number of deposit slips.[4] A staff member of the Subcommittee, Bellino, identified 62 bank checks given to him by petitioner two days after the subcommittee hearing, and Sexauer identified them as clearing through the accounts of the San Antonio bank. These checks correspond to the withdrawal notations on the ledger sheets (R. 16-20). Witness Bahlman of Union Trust in Washington, D. C. identified petitioner as the purchaser of drafts and

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[2] Later, after testifying that following 1946 he opened another account at the Liberty National Bank, he testified that he had no other bank account at any time except with Union Trust and Liberty National (R. 39-40).

[3] These two ledger sheets (Gov. Ex. 4) indicate this account was opened July 29, 1943 and closed March 15, 1947, and that large deposits and withdrawals were made in 1945 and 1946, the balance at the end of 1946 being over $19,000.

[4] Gov. Ex. 4B-4W.

treasurer's checks for cash, some of which were indorsed for deposit to the National Bank of Commerce, San Antonio, Texas (R. 60-65, Gov. Ex. 31A-31S). The testimony of Bray (Tr. 550-555) and Wainwright (Tr. 574-575), both of whom identified petitioner, substantiates petitioner's custom of buying drafts for cash from Union Trust and depositing them by mail in the San Antonio account. The day after the subcommittee hearing, when petitioner was told that there were indications that he had an account in the National Bank of Commerce in San Antonio under the name of "J. H. Maragon," he admitted that such was the fact (R. 68-73).[5]

B. *The Evidence as to Count Three.* Petitioner was also questioned by the Subcommittee as to his employment. He testified that in July 1945 Mr. Bennett, president of the Verley Company, offered to "employ" him to go to Europe to reestablish his "essential oil"[6] business in Europe (R. 31). He thereupon resigned his position with the Baltimore and Ohio Railroad (R. 27, 31); accepted the position "as full-time employee at $1,000 a month or $12,000 a year" beginning in July 1945 (R. 31); and proceeded to Europe with all expenses paid by Verley (R. 31-32). As to 1945, he testified that his

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[5] On this occasion he contended that he opened the account while with the B & O Railroad by depositing therein an inheritance of his wife, and that he used that account from then on to deposit funds turned over to him by tourists (R. 73).

[6] Used for the manufacture of perfume (R. 58).

only employment was with the B & O Railroad and Verley (R. 32). On being asked if he had any income in 1946 from anyone except the Verley Company, he stated that he had income also from the State Department when he went with the Grady Mission to Greece (R. 35). In response to a question as to whether his State Department income was from a salary or expenses, he answered (R. 36): "Yes, sir; I was not in the employ of anybody else then." He admitted, however, receiving $6,000 compensation from the Verley Company in 1946 (R. 23, 36) and described a trip he took for them to Europe in 1946 on company business for which he got an additional $1,000 bonus and all his expenses paid by the Verley Company (R. 36-37). He also stated that in 1946 he worked seven months for the Verley Company, but because of press attacks by a columnist named Pearson, his services were discontinued with Verley, and that he then went to work for the State Department (R. 36).[7]

On the trial, witness Sakell of the State Department identified petitioner as a member of the so-called Grady Mission to Greece which left on January 27, 1946, and came back on May 1, 1946 (R. 51). State Department records showed that petitioner was employed by the State Department from November 28, 1945 to March 14, 1946 (Tr. 478-481,

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[7] Later he stated that his services with the Verley Company were terminated "sometime during the middle of the year" 1946 (R. 39).

Gov. Ex. 21), a fact admitted by petitioner in open court (R. 51-52). Jeanette Schwartz of the Verley Company testified that in July 1945, petitioner took over duties for the president of that company who had become ill, and he remained with that company until August of 1946. She identified a letter dated October 10, 1945, addressed to Maragon from the Verley Company enclosing checks, notifying him he would get a $1,000 check each month, and asking him if he wanted to charge these checks to regular salary (R. 55-56, Gov. Ex. 24). A letter from petitioner to Bennett of the Verley Company dated September 1, 1946, was offered in evidence indicating that petitioner had been associated with that company for the preceding fifteen months but was then leaving its employ (R. 57, Gov. Ex. 25).

Bellino, the accountant for the Subcommittee, testified that the day after the hearing, petitioner stated that when he was in Greece on the Government payroll, he had been approached by private interests to transact business but he had not done so. Bellino first discovered the fact of petitioner's dual employment about August 12, 1949, when, in examining the Verley Company records after the hearing, he noted that petitioner had been employed by that company during the period from November 1945 to March 1946, when he was also on the State Department payroll, and that petitioner had charged a similar trip to both his State De-

partment and Verley expense accounts during this period (R. 66-67).

Petitioner did not testify and produced only one witness, Senator Mundt of the Subcommittee, who testified that, prior to the Subcommittee hearing, petitioner had requested an opportunity to refute certain press articles written by Pearson (R. 78-79).

ARGUMENT

1. Petitioner argues that as a matter of law the evidence is insufficient to meet the quantitative rule of evidence applied in perjury prosecutions as "no single witness testified in terms sufficient to show the falsity of petitioner's oath" (Pet. 9-10). This argument erroneously assumes that, under the perjury rule, at least one witness must directly testify to all aspects of the falsity regardless of how many witnesses testify or how much documentary evidence is adduced.

As the Court of Appeals held, however, the true rule stated by this Court in *Hammer* v. *United States,* 271 U.S. 620, 626, and repeated in *Weiler* v. *United States,* 323 U.S. 606, 607, is merely that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury." The rationale of this rule, as stated in the *Weiler* decision (p. 609), is that "A conviction for perjury ought not to rest entirely upon 'an oath against an oath'." There is no requirement that at least one

witness must independently establish all the facts, regardless of the other testimony. The testimony of several witnesses, testifying to different facts, is often mutually corroborative of the ultimate fact to be established. *United States* v. *Palese,* 133 F. 2d 600, 602 (C.A. 3). This Court has so recognized even with respect to treason cases which are subject to more stringent rules of proof than perjury (see *Haupt* v. *United States,* 330 U.S. 631, 640). Indeed, it has long been established that perjury may be proved without a witness at all, if there is documentary evidence emanating from the perjurer, as such writings may be better evidence of falsity than any amount of oral testimony. *Hammer* v. *United States, supra* (271 U.S. 620, 627); *United States* v. *Wood,* 14 Pet. 430. Manifestly, therefore, the rule as to quantum of proof in perjury cases requires no more than that there be weightier proof than the testimony of a single witness.[8]

Here, as the court below pointed out, the Government did not rest upon the uncorroborated testimony of one witness or on documentary evidence alone, but upon the testimony of a number of witnesses and "an accumulation of uncontroverted documentary evidence, supplemented by identification of appellant as a party to some of the docu-

[8] The quotation from *United States* v. *Hiss,* 185 F. 2d 822 (C. A. 2), on which petitioner relies to establish a conflict with the decision below (Pet. 9), is merely a restatement of the established perjury rule. The court was not addressing itself to the implications which petitioner tries to read into that rule.

ments, and upon statements by appellant" (R. 104). The evidence was clearly sufficient to meet the perjury rule and to support the verdict.

2. Petitioner also objects (Pet. 7, 11-13) to the trial court's failure to instruct the jury that the false statement must be made "wilfully," as required by 22 D.C. Code 2501 (1940) (*supra*, p. 2). The court instructed as follows (R. 81):

> Perjury is simply the giving of false testimony under oath, *testimony that a party does not believe to be true.* If he testifies before a competent tribunal as to a fact which is false, *and he does not believe it to be true,* then that would be perjury. [Italics supplied.]

It is clear that this instruction adequately embraced the elements of the crime (R. 88-89).

The Court of Appeals has interpreted the word "wilfully," as used in the District of Columbia perjury section, to mean "knowingly" or "intentionally" (R. 104), a meaning obviously covered by the above italicized portion of the charge. Although that word may vary in meaning depending on the particular statutory context,[9] the meaning given by the Court of Appeals finds ample support in cases dealing with the federal perjury section[10] (*United States* v. *Norris*, 300 U.S. 564, 571, 574; *United States* v. *Seavey*, 180 F. 2d 837 (C.A. 3), certiorari denied, 339 U.S. 979; *Fotie* v. *United States*,

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[9] See *Screws* v. *United States*, 325 U. S. 91, 101 (opinion of Douglas, J.).

[10] 18 U. S. C. 1621.

137 F. 2d 831, 840 (C.A. 8); *United States* v. *Otto*, 54 F. 2d 277, 279 (C.A. 2)), and also under the District of Columbia perjury section,[11] *Pyle* v. *United States*, 156 F. 2d 852, 856 (C.A. D.C.).

Petitioner cites cases which he contends are in conflict with the decision below.[12] Those cases, however, use the word "wilfully" in the same sense as the word "deliberate" is used in the definition of perjury given by the *Norris* case, *supra* (300 U.S. at p. 574): a "deliberate material falsification under oath." The necessity of finding wilfulness is to insure that the jury will not consider the truth or falsity of defendant's sworn statement without regard to defendant's knowledge of its falsity. Since, in this case, under the judge's charge, the jury was required to find not only that petitioner's sworn statement was false, but that petitioner did not "believe it to be true", the charge correctly defined this element of the crime.

3. Petitioner objects to the presence of Government employees on both the grand and petit juries (Pet. 7, 13-14). The objection to their presence on the grand jury was raised on motion to dismiss the indictment which was supported by an affidavit of petitioner's counsel stating merely that there were fourteen Government employees on the grand jury

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[11] 22 D. C. Code 2501 (1940), *supra*, pp. 2-3.

[12] *Smith* v. *United States*, 169 F. 2d 118 (C. A. 6); *Luse* v. *United States*, 49 F. 2d 241, 246 (C. A. 9); *Kuskulis* v. *United States*, 37 F. 2d 241, 242 (C. A. 10); *Epstein* v. *United States*, 271 Fed. 282, 283 (C. A. 2).

(R. 6-7). No reason was advanced to show how this was prejudicial to petitioner. The District Court denied the motion (R. 8). On the *voir dire* petitioner's counsel, after exhausting his peremptory challenges, challenged for cause four Government-employed jurors on the ground of "implied bias" since the case involved witnesses who were "members and employees of a subcommittee of the Senate Committee on Expenditures and Budget." The court overruled the challenges (R. 10-11).

This Court has on several occasions upheld the right of Government employees to serve as jurors in criminal prosecutions. *United States* v. *Wood,* 299 U.S. 123; *Frazier* v. *United States,* 335 U.S. 497; *Dennis* v. *United States,* 339 U.S. 162. In the *Dennis* case, involving the trial of the General Secretary of the Communist Party for willfully failing to appear before the Committee on Un-American Activities of the House of Representatives, the defendant claimed implied bias on the ground that a vote for acquittal might be interpreted as "sympathetic association" with communism which would subject the government juror to discharge on loyalty grounds. In upholding the right of government employees to act as jurors in that case, this Court said (339 U.S. at pp. 171-172):

> We think the rule in *Wood* and *Frazier* should be uniformly applied. A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. The Act [11 D.C. Code

> 1420 (1940)] makes no exception for distinctive circumstances.
>
> * * * * *
>
> In this case, no more than the trial court can we without injustice take judicial notice of a miasma of fear to which Government employees are claimed to be peculiarly vulnerable—and from which other citizens are by implication immune. Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them.

Petitioner makes no claim of actual bias in his case on the part of the jurors. He argues that, as the function of the parent committee was to consider and make recommendations to the Senate upon matters relating to budget, governmental reorganization, and governmental operation, the Government jurors could not render a verdict free from bias at a trial where a subcommittee member and employees were witnesses (Pet. 13-14).[13] This is patently a more tenuous argument than was advanced in the *Dennis* and *Frazier* cases, and is overruled by the holding of those cases.

4. Petitioner further contends (Pet. 15-16) that

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[13] One Senator from the subcommittee (R. 11) and two staff members (R. 17, 68) testified at the trial.

the Subcommittee on Senate Investigations was not a "competent tribunal" at the time of petitioner's sworn testimony before that body because it was sitting in executive session contrary to Section 133(f) of the Legislative Reorganization Act of 1946 (*supra,* p. 3). He argues that although Section 133(f) permits the majority of a committee to vote executive sessions, and although the parent Committee on Expenditures in the Executive Departments had authorized the subcommittee to hold executive sessions "whenever it is deemed advisable" (R. 93-95), such authority given during the 80th Congress did not obtain at the time of the subcommittee investigation during the 81st Congress.

The subcommittee was established by action of the full standing Committee on February 26, 1948. Besides being empowered to proceed with any investigation within the jurisdiction of the full committee, it was given the power "to hold executive sessions rather frequently for the purpose of taking testimony of, or conferring with, Government officials and others, in order to determine the advisability of holding public hearings" (R. 93-95, Gov. Ex. 7).

The creation of this subcommittee followed the promulgation of Senate Resolution 189, 80th Congress, 2d session (R. 96-97, Gov. Exs. 8, 9).[14] The

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[14] This resolution provided that the Committee "or any duly authorized subcommittee thereof" could make certain expendi-

authority given by this Senate Resolution was extended by Senate Resolution 259, 80th Congress, 2d session, to February 15, 1949 (R. 98, Gov. Ex. 10). On January 19, 1949, at an executive meeting of the parent Committee, the personnel of the subcommittee were approved, including the appointment of Senator Hoey as Chairman (R. 92, Gov. Ex. 3). On February 10, 1949, the power given the Committee and "any duly authorized subcommittee thereof" by Senate Resolution 189 of the 80th Congress was again extended by Senate Resolution 52 of the 81st Congress to include the period beginning February 16, 1949, and ending on February 15, 1950 (R. 91, Gov. Ex. 1). Petitioner testified on July 28, 1949 (R. 20).

Manifestly, the resolution of the 81st Congress continued the life of the Committee from the 80th Congress into the 81st Congress. The fact that there was a change in the membership of the Committee (a standing committee) and its subcommittee does not affect the continuity of the organization and powers of the subcommittee. The authority of the subcommittee to hold executive sessions, conferred by action of the full standing Committee on February 26, 1948, during the 80th

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tures and employ personnel to carry out the duty imposed on the Committee by subsection (g) (2) (B) of Rule XXV of the Standing Rules of the Senate, *i. e.*, "Studying the operation of Government activities at all levels with a view to determining its economy and efficiency."

Congress was therefore continued into the 81st Congress.[15]

CONCLUSION

The decision below is correct, and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1951.

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[15] A final contention is made that the statements alleged as the basis for the charge under count three were lifted out of context (Pet. 16-19). Since petitioner was given concurrent sentences on both counts, the separate argument addressed to one count alone is immaterial. In any event, resort to the context, including the uncontroverted evidence of dual employment, refutes such a contention, and reinforces the conclusion that the statements were false and that petitioner knew them to be false. This contention goes to the weight of the evidence as the jury considered the entire transcript of the subcommittee hearing (R. 20-50, Gov. Ex. 2) as well as the rest of the evidence.

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